No. 80-955

APR 13 1981

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IN THE

# Supreme Court of the United States

October Term, 1980

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner

v.

MICHAEL R. WENGER, Commissioner,
West Virginia Department of Employment Security;
J. F. McCLANAHAN, CLARENCE ELMORE,
and JOHN T. POFFENBARGER,
Members of the Board of Review,
Respondents.

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION


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TABLE OF CONTENTS

PAGE

I. This Court's Decision In New York Telephone Did Not Create An Exemption From Labor Law Preemption For State Unemployment Laws Such As West Virginia's, Because That Decision Was Limited To A State System Which Did Not Regulate The Bargaining Relationship Between An Employer And Its Employees ..... 1

II. Because The West Virginia Statute Involves Scrutiny And Regulation Of The Propriety Of The Employer's Collective Bargaining Practices, Even If The Statute's Purported Purpose Were To Pay Benefits, That Alleged Purpose Would Not Eliminate The Preemption Issue ..... 5

Conclusion ..... 10

## TABLE OF AUTHORITIES

CASES PAGE

*Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1972) ..... 5

*Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951) ..... 5, 6

*Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967) ..... 3, 6

*New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979) ..... 1, 2, 4, 7

*Roe v. Wade*, 410 U.S. 113 (1973) ..... 7, 8

*San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) ..... 3

*Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974) ..... 7

*Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955) 6

STATUTES

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §151 et seq. (1976) ..... passim

W. Va. Code §21A-6-3(4) ..... passim

## PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' Brief in Opposition is based upon two fundamental misconceptions concerning the principles of federal labor law preemption set forth in prior decisions of this Court:

1) That the plurality decision in *New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519 (1979) provides a blanket exception from federal preemption for all state unemployment compensation laws, regardless of the extent to which a particular state statute regulates the collective bargaining process between an employer and its employees.

2) That because the purported purpose of the West Virginia unemployment compensation law is to pay unemployment compensation benefits, that law does not "regulate" collective bargaining and is therefore not subject to federal preemption.

These misconceptions serve to underscore the need for this Court to grant plenary review in this case, and to clarify the principles enunciated in *New York Telephone* with respect to these important issues of federal labor law preemption.

### I. This Court's Decision In New York Telephone Did Not Create An Exemption From Labor Law Preemption For State Unemployment Laws Such As West Virginia's, Because That Decision Was Limited To A State System Which Did Not Regulate The Bargaining Relationship Between An Employer And Its Employees.

In *New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519 (1979), this Court, in a plurality opinion authored by Justice Stevens, ruled

that New York's unemployment compensation law (under which striking employees, after an eight-week waiting period) receive benefits from a fund financed by employer contributions, was not preempted by federal labor law. Resondents read *New York Telephone* as providing a blanket exemption from federal preemption for all state unemployment compensation statutes, regardless of the extent to which those laws regulate the collective bargaining process between an employer and its employees. Brief in Opposition at 13-14.

As Respondents admit, however, the "primary concern" of the Court in *New York Telephone* "was the effect of unemployment compensation benefits on the outcome of a labor dispute." Brief in Opposition at 12. *New York Telephone* did not address the present situation, wherein the West Virginia statute subjects the bargaining conduct of an employer to scrutiny and review by a state administrative tribunal as a necessary corollary to that tribunal's determination of the eligibility of striking employees for unemployment compensation benefits. Unlike the West Virginia statute, New York's unemployment compensation law provided for payment of benefits to all striking employees after an eight-week waiting period, and did not involve any state infringement upon matters which lie in the exclusive jurisdiction of the National Labor Relations Board, such as the regulation of bargaining conduct.

On the other hand, the West Virginia statute generally denies benefits to striking employees. But that statute awards benefits to strikers if the West Virginia state authorities determine that the employer has committed an unfair practice in its bargaining with employees. W. Va. Code §21A-6-3(4). Petition at 11 n.5 and 19. Respondents admit that this provision requires the

West Virginia Board of Review to examine the same issues as would be reviewed by the NLRB in an unfair labor practice proceeding. In fact, Respondents go so far as to state that if "the National Labor Relations Board makes a different determination under the same set of facts, they would not affect the validity of the State decision." Brief in Opposition at 15.

This is certainly a situation where a state statute interferes with the NLRB's development of uniform principles governing the collective bargaining process. Although the NLRB might have held a particular bargaining practice to be perfectly legal in numerous decisions, an employer with employees in the state of West Virginia would still be loathe to engage in that practice if it were contrary to the rules developed by the West Virginia unemployment compensation officials. Subjecting the bargaining conduct of an employer to the scrutiny of an administrative agency other than the NLRB "invites precisely the harms that the preemption doctrine is designed to avoid." *New York Telephone, supra,* 440 U.S. at 529 n. 15. *See also Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959).[1]

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1. Respondents' attempt to distinguish this Court's decision in *Garmon* (Brief in Opposition at 8) is unpersuasive. The instant case involves state regulation of employer conduct—through state scrutiny of bargaining practices—much as *Garmon* involved state regulation of conduct within the exclusive jurisdiction of the NLRB. In fact, a NLRB charge was filed against Westinghouse by the IUE challenging the very same conduct which was at issue in the West Virginia unemployment compensation proceedings. See Petition at 7.

The difference between the *New York Telephone* situation and the present case is quite dramatic. It is essentially the difference between a general tax and a specific fine. While the New York statute acts like a general tax and does not regulate the practices engaged in by employers in bargaining, the West Virginia statute is in the nature of a specific fine which will regulate an employer's conduct by imposing liability upon it if it engages in what the state finds to be improper conduct in the collective bargaining.[2] If Respondents are correct in asserting that a blanket exemption from preemption exists for state unemployment compensation laws, then a state could regulate virtually any aspect of the employer-employee relationship. For example, a state could have a law denying benefits to workers who were discharged, except in cases in which the discharge was for conduct which the state finds was protected by §7 of the NLRA. Similarly, a state could provide benefits to all employees engaged in an economic strike, except those employees who picket the employer's plant. Contrary to Respondents' assertion, however, these types of statutes clearly would be preempted under the numerous prior decisions of this Court.

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2. Respondents admit that unemployment compensation awards rendered today will affect Westinghouse's merit rate account and monetary payments in the future, even though all West Virginia employers currently are paying the same rate because of insolvency of the trust fund. (Brief in Opposition at 9). Thus, an award of unemployment compensation against Respondent would cost 1.5 million dollars although that payment would not occur all in the present year. Petition at 5 n. 2. Moreover, the unconstitutionality of the West Virginia statute is not removed because, at the present time, the monetary impact of a 1.5 million dollar award will be delayed slightly.

The position asserted by Respondents, and the position adopted by the District Court and Fourth Circuit in this case—that a blanket exception to labor law preemption exists for all state unemployment compensation laws—is based upon a misconception of the rationale of the plurality decision in *New York Telephone,* and contravenes the principles underlying the labor law preemption doctrine as enunciated in numerous decisions of this Court.

**II. Because The West Virginia Statute Involves Scrutiny And Regulation Of The Propriety Of The Employer's Collective Bargaining Practices, Even If The Statute's Purported Purpose Were To Pay Benefits, That Alleged Purpose Would Not Eliminate The Preemption Issue.**

The second fundamental misconception inherent to the arguments set forth in Respondents' Brief in Opposition is that because the alleged purpose of the West Virginia unemployment statute is to pay benefits, that statute is automatically exempted from federal preemption. Under Respondents' view, states apparently would be free to regulate the relations between an employer and his employees to any extent desired, so long as such regulation occurs in conjunction with application of an unemployment compensation statute. This view is not supported by the decisions of this Court in which the labor law preemption doctrine has been applied to state laws in spite of the general applicability of those laws. See, e.g., *Amalgamated Association of Street Electric Railway & Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1972) (state general contract law preempted); *Garmon, supra* (State tort law); *Amalgamated Association of Street, Electric Railway & Motor*

*Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board,* 340 U.S. 383 (1951) (state law protecting the public from interruption of Public Utility service); *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468 (1955) (state restraint of trade statute). Importantly, in *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), this Court held that a *state unemployment compensation law* was preempted by the Act.

Thus, there is no merit to Respondents' argument that the West Virginia statute is exempt from preemption because its purpose is to provide for unemployment compensation benefits. The purported purpose of a state statute is not dispositive for preemption purposes. Indeed, *"[r]egardless of the mode adopted,* to allow the states to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Garmon, supra,* 359 U.S. at 244. (Emphasis supplied).

As shown by the above decisions, this Court has on numerous occasions looked at the effect, rather than the stated purpose, of state statutes in applying the preemption doctrine because many types of state statutes, in addition to specific state labor laws, can regulate activity covered by the NLRA and thereby create the risk of inconsistent regulation. Certainly, the statute in the instant case regulates collective bargaining even though its purported purpose concerns unemployment compensation benefits. Under the applicable provision of W.Va. Code §21A-6-3(4), state officials or state judges must determine whether an employer has denied employees "the right of collective bargaining under generally prevailing conditions." Under this provision,

West Virginia state officials make determinations concerning the propriety of Westinghouse's 1979 national collective bargaining with the IUE and other unions. *See* Petition at 7-8. Thus, in this case, even if the alleged purpose of West Virginia's statute related to unemployment compensation, its effect nonetheless is to regulate activity which is the central concern of the NLRA.

Respondents repeatedly attempt to minimize the effect of the lower court's decision by noting that West Virginia's Board of Review eventually denied benefits to the employees participating in the strike at Westinghouse's Fairmont, West Virginia plant. Respondents' reliance on that decision,[4] underscores the fact that Respondents have totally missed the point of Petitioner's preemption argument. The point which Respondents ignore is that nothing in *New York Telephone,* or in the legislative history of the Social Security Act upon which this Court relied in *New York Telephone,* authorizes states to involve themselves in the employer's bargaining practices by determining matters which lie in the exclusive jurisdiction of the NLRB, such as the propriety of the conduct of an employer during collective bargaining.

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4. The Board of Review decision was recently affirmed by the West Virginia Circuit Court. The decision of the West Virginia Circuit Court may be appealed to the West Virginia Supreme Court of Appeals by filing a petition within sixty days of the decision. The fact that the denial of benefits was affirmed by the West Virginia Circuit Court does not render the preemption arguments of Westinghouse moot, because the interference of West Virginia's unemployment compensation law with the collective bargaining process is an issue which is "capable of repetition, yet evading review." *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 125 (1974); *Roe*

Respondents concede that if the lower court's decision is permitted to stand, national employers such as Westinghouse will be subject to inconsistent and divergent regulation of collective bargaining from state to state.[5] Respondents assert, however, that such divergent regulation is present in all situations where states are permitted to enact their own programs. *Id.* Respondents' assertion underscores the importance of the instant case, and the need for this Court to grant plenary review.

The cornerstone of the labor preemption doctrine is the presumption that when Congress enacted the NLRA, it intended that the NLRB would develop uniform standards to be applied in assessing the propriety of conduct of employers, employees, and labor organizations subject

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*v. Wade,* 410 U.S. 113, 125 (1973). Without review of the constitutionality of West Virginia's statute at this time, the propriety of Westinghouse's conduct during future collective bargaining negotiations will continue to be subject to the regulation and scrutiny by state agencies, in clear contravention of the principles underlying the preemption doctrine.

5. Brief in Opposition at 17. The deleterious effect which such a principle would have upon national collective bargaining is apparent. Negotiators would have to gauge their conduct during bargaining not only to the standards developed by the NLRB, but would also be required to ensure that their conduct, even if legal under the NLRA, did not violate some state unemployment compensation board's notion of "good faith" bargaining. Each state could have different standards, and employers such as Westinghouse, with employees in many different states, would have to constantly assess their bargaining position to avoid the potential of multi-million dollar claims against the company. Indeed, under Respondents' view, it may be necessary for an employer, in order to comply with the bargaining standards of one state, to engage in conduct which would violate the standards in another state or the standards developed by the NLRB.

to the NLRA's provisions. If each state has the unrestricted power to develop its own standards of conduct for collective bargaining by making unemployment compensation benefit awards hinge upon a determination of whether employees have been "denied the right of collective bargaining under generally prevailing conditions," then the preemption doctrine, which this Court has developed over a period of almost fifty years, will be severely undermined.

We respectfully submit that the Court should accept this case to clarify this issue. The Fourth Circuit has incorrectly held that the doctrine of federal labor preemption is totally inapplicable to whatever regulation of collective bargaining conduct that a state effects through use of its unemployment compensation laws.[6]

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6. The list of subsidiaries of Westinghouse required by Rule 28.1 was affixed to the Petition filed on December 12, 1980.

## CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, Westinghouse respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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